No. 01-391

In the Supreme Court of the United States

GREGORY WAYNE GINN AND GREGORY WAYNE GINN, P.C., PETITIONERS

v.

UNITED STATES TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction under 28 U.S.C. 158(d) to review a district court decision affirming certain preliminary rulings of a bankruptcy court and remanding the case to the bankruptcy court for further proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported. The orders of the district court (Pet. App. 2, 3-5, 6-7) and the decision of the bankruptcy court (Pet. App. 8-26) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2001. The petition for a writ of certiorari was filed on August 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of filings by Allied Physicians Group, P.A. and Allied Physicians of DFW, Inc. for relief under the debt reorganization provisions of Chap-

ter 11 of the Bankruptcy Code. 11 U.S.C. 1101 *et seq.* Allied Physicians Group, P.A. was owned by a group of physicians. Its primary asset was 100% of the stock of Allied Physicians of DFW, Inc., whose business was to collect accounts receivable for the physicians and to pay salaries, benefits, vendors, and office expenses. The debtors, with the approval of an official unsecured creditors' committee, filed a liquidating plan which, in a later amended form, was confirmed by the bankruptcy court. The two cases were consolidated in the order confirming the plan. The plan created the position of a Plan Agent and identified petitioners, Gregory Wayne Ginn and Gregory Wayne Ginn, P.C., as the Plan Agent. Pet. App. 8-10.

The primary responsibility of the Plan Agent was to recover and liquidate the assets of the estate. The plan set out a procedure for the authorization of payments to professionals hired by the Plan Agent by which the professional was to file a fee statement with the bankruptcy court and submit it to the Plan Agent and the Plan Advisory Committee. If no objection was filed, the Plan Agent was to pay the amount set forth in the statement. The plan also addressed fees of Mr. Ginn providing that he could be compensated at an hourly rate of $160.00 per hour and reimbursed for reasonable out-of-pocket expenses incurred in the performance of his duties. Pet. App. 10-12.

In September 1999, pursuant to the bankruptcy court's request, Mr. Ginn filed a Status Report which detailed the estate's income and disbursements. Based upon information disclosed in the Status Report, the bankruptcy court determined that Mr. Ginn had compensated himself and his attorneys without complying with the terms of the plan. Pet. App. 30-32. Pursuant

to a request by the United States Trustee[1] and based on the results of the Status Report, the bankruptcy court issued a Show Cause Order directing Mr. Ginn to appear at a hearing and show cause why he should not be removed as Plan Agent and why he should not be required to disgorge all payments for compensation and expenses in the case. *Id.* at 33. After the hearing, the bankruptcy court enjoined Mr. Ginn from making any payments unless otherwise ordered by the court and enjoined all attorneys representing the Plan Agent from taking further action on behalf of the Plan Agent without further order of the court. The court also ordered Mr. Ginn and other professionals to disgorge any unapproved payments received from the Plan Agent and remit those payments to the registry of the court. The bankruptcy court also converted the case from a Chapter 11 proceeding to a Chapter 7 proceeding. Those rulings were memorialized in a Show Cause Order, dated November 11, 1999. *Id.* at 27-28.

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[1] The United States Trustee's Program within the Department of Justice was created by Congress to aid in the administration of bankruptcy cases. See, *e.g.*, *Morgenstern* v. *Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990). Each U.S. Trustee supervises the administration of bankruptcy cases as appropriate and maintains a panel of private trustees who are available to serve as trustees in bankruptcy cases. See 28 U.S.C. 586. The U.S. Trustee has standing to raise any issue under the bankruptcy title and may appear and be heard on any bankruptcy issue, although a Trustee may not file a reorganization plan. See 11 U.S.C. 307; *Haden* v. *Pelofsky*, 212 F.3d 466, 468 n.5 (8th Cir. 2000); *U.S. Trustee* v. *Fishback (In re Glados)*, 83 F.3d 1360, 1361 n.1 (11th Cir. 1996); *U.S. Trustee* v. *Columbia Gas Systems Inc. (In re Columbia Gas Systems Inc.)*, 33 F.3d 294, 295-299 (3d Cir. 1994); *Morgenstern* v. *Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d at 499-500.

The bankruptcy court subsequently issued Findings of Fact and Conclusions of Law, ruling that Mr. Ginn had intentionally breached his duty as a fiduciary to the creditors under the plan and had acted in a grossly negligent manner. Pet. App. 23. The bankruptcy court reiterated its preliminary disgorgement ruling and ordered Mr. Ginn and the attorneys who were paid in violation of the provisions of the plan to disgorge all receipts "pending some later determination by the Court as to entitlement of fees and expenses, if any." *Id.* at 26.

2. The district court affirmed the bankruptcy court's Show Cause Order and its findings and conclusions and remanded the case for "further proceedings not inconsistent with [its] opinion." Pet. App. 4. The district court stated that the bankruptcy court's findings and conclusions were "preliminary," and subject to change as a result of the further proceedings to be conducted in the bankruptcy court to determine appropriate fees and expenses. *Ibid.* The district court also stated that its ruling did not preclude the bankruptcy court "from modifying or vacating" its findings and conclusions "as needed to effectuate a fair and prompt distribution of the disgorged funds, and to comply with the requirements of procedural due process." *Ibid.*

3. In an unpublished per curiam order, the court of appeals dismissed petitioners' appeal for lack of jurisdiction. Pet. App. 1.

ARGUMENT

The court of appeals correctly dismissed petitioners' appeal. All of the courts of appeals agree that where, as here, the bankruptcy court ruling is *not final*, the district court order reviewing the interlocutory bankruptcy ruling is not subject to an immediate appeal

under 28 U.S.C. 158(d). The circuit conflict identified by petitioners pertains to the finality of district court remands on review of a *final* bankruptcy court order, and the conflict therefore is not implicated in this case.

1. District courts have jurisdiction to hear appeals from final judgments and orders of bankruptcy courts, 28 U.S.C. 158(a)(1), and, "with leave of the court," to hear appeals "from other interlocutory orders and decrees." 28 U.S.C. 158(a)(3). Courts of appeals have jurisdiction to hear "appeals from all final decisions, judgments, orders, and decrees" entered by the district court or a bankruptcy appellate panel. 28 U.S.C. 158(d).[2] All of the courts of appeals have concluded that, where the bankruptcy court ruling is not final, the district court order reviewing the interlocutory bankruptcy ruling is also not final for purposes of 28 U.S.C. 158(d). *Stubbe* v. *Banco Cent. Corp. (In re Empresas Noroeste, Inc.)*, 806 F.2d 315, 316 (1st Cir. 1986); *Flor* v. *BOT Fin. Corp. (In re Flor)*, 79 F.3d 281, 283 (2d Cir. 1996); *Commerce Bank* v. *Mountain View Vill., Inc.*, 5 F.3d 34, 36 (3d Cir. 1993); *Sumy* v. *Schlossberg*, 777 F.2d 921, 922-923 (4th Cir. 1985); *Andrews & Kurth, L.L.P.* v. *Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 420 (5th Cir. 1998); *Marlow* v. *Rollins Cotton Co. (In re Julien Co.)*, 146 F.3d 420, 422 (6th Cir. 1998); *In re Rimsat Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *Lewis* v. *United States, Farmers Home Admin.*, 992 F.2d 767, 768, 772 (8th Cir. 1993); *Stanley* v. *S.S. Retail Stores Corp. (In re S.S. Retail Stores Corp.)*, 162 F.3d 1230, 1232 (9th Cir. 1998);

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[2] This Court also has recognized that an interlocutory appeal sought pursuant to 28 U.S.C. 1292(b) is available in the bankruptcy context. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).

Simons v. *FDIC (In re Simons)*, 908 F.2d 643, 644 (10th Cir. 1990) (per curiam); *Dzikowski* v. *Boomer's Sports & Recreation Ctr., Inc. (In re Boca Arena, Inc.)*, 184 F.3d 1285, 1286 (11th Cir. 1999); see also 1 Lawrence P. King, *Collier on Bankruptcy* ¶ 5.09[2] (15th ed. rev. 2001).

The Fifth Circuit properly dismissed petitioners' appeal pursuant to this well-established rule. The bankruptcy court issued an interim disgorgement order that explicitly anticipates further proceedings to determine the appropriate amounts of fees and expenses to be granted to petitioners and the other professionals. Pet. App. 26 (ordering disgorgement "pending some later determination by the [bankruptcy court] as to entitlement of fees and expenses"). The disgorged funds have not been distributed to creditors but those funds instead have been ordered to be deposited with the court registry to be held until the court has the opportunity to conduct further proceedings and to determine the appropriate amounts to be paid to each of the parties.

The district court similarly recognized the interlocutory nature of the bankruptcy court proceedings. Although the district court did not explicitly grant leave for the parties to appeal the interlocutory order of the bankruptcy court under 28 U.S.C. 158(a), the district court referred to the bankruptcy court's findings as "preliminary" and noted that those findings are "always subject" to later modification or vacatur. Pet. App. 4. The district court further emphasized that its ruling did "not preclude [the bankruptcy court] from

modifying or vacating" its findings and conclusions. *Ibid.*[3]

2. Petitioners identify (Pet. 11-15) a split in the circuits on the question whether a court of appeals has jurisdiction to hear an appeal of a district court decision reviewing a *final* order from the bankruptcy court and remanding for further proceedings. But that split of authority is not implicated by this case. A majority of courts have held that where a final bankruptcy court decision has been appealed and the district court, either affirming or reversing, remands the case to the bankruptcy court, the district court's order is not final unless the remand involves only ministerial action by the bankruptcy court. See *In re Lopez*, 116 F.3d 1191, 1192-1193 (7th Cir.) (citing cases from eight other circuits), cert. denied, 522 U.S. 1014 (1997). By contrast, the Third and the Ninth Circuits have held that a court of appeals has jurisdiction to hear an appeal of a district court order reviewing a final bankruptcy court decision, even though the district court's decision would not otherwise be considered final because it remanded the case back to the bankruptcy court for further proceedings. *In re Continental Airlines, Inc.*, 932 F.2d

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[3] Petitioners err in contending (Pet. 21-28) that the bankruptcy court's findings are final because that court lacked statutory authority to enter the Show Cause Order and violated petitioners' due process rights, and because the bankruptcy court sent its findings and conclusions to the Texas State Board of Accountancy. Petitioners' statutory challenge may be raised upon an appeal from any final bankruptcy and district court order. Moreover, the bankruptcy court's order expressly contemplates further proceedings, Pet. App. 26, and the district court's decision recognizes that the bankruptcy court may change its preliminary findings and that the further proceedings will be consistent with petitioners' due process rights, *id.* at 4.

282, 286 (3d Cir. 1991); *Sambo's Rests., Inc.* v. *Wheeler (In re Sambo's Rests., Inc.)*, 754 F.2d 811, 814 (9th Cir. 1985).

That conflict, however, is not implicated by the decision below because the bankruptcy court's order here is not final. The question that has divided the circuits, therefore, is not even at issue in this case. Moreover, even were the conflict relevant here, the court of appeals' unpublished, per curiam order would be an especially poor vehicle for this Court's review. Indeed, this Court on several occasions has declined to review the circuit split petitioners have identified. See *In re Lopez*, 116 F.3d 1191 (7th Cir.), cert. denied, 522 U.S. 1014 (1997); *Conroe Office Bldg., Ltd.* v. *Nichols (In re Nichols)*, 21 F.3d 690, 692 (5th Cir.), cert. denied, 513 U.S. 962 (1994); *First Nat'l Bank of Tekamah* v. *Hansen (In re Hansen)*, 702 F.2d 728 (8th Cir.), cert. denied, 463 U.S. 1208 (1983); *Official Unsecured Creditors' Comm.* v. *Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 448 (3d Cir. 1982), cert. denied, 459 U.S. 1207 (1983).

3. Petitioners also contend (Pet. 15-28) that the court of appeals' decision conflicts with other decisions of the Fifth Circuit that deem a district court's order of remand final if the remand involves only ministerial action by the bankruptcy court. That alleged intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners' contention lacks merit. The district court's remand order contemplates significant further proceedings by the bankruptcy court to determine petitioners' entitlement to fees. Pet. App. 4. Moreover, the Fifth Circuit adheres to the rule, shared by all circuits, that the courts of appeals have jurisdiction under 28 U.S.C. 158(d) to review only those

district court decisions that review *final* bankruptcy court orders. See *Andrews & Kurth*, 157 F.3d at 420. Because, as noted above, the bankruptcy court order in this case was not final, the district court ruling is also not final under well-settled Fifth Circuit precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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